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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

CRAIG DOYAL,

Petitioner

v.

STATE OF TEXAS,

Respondent

BRIEF OF AMICI CURIAE TEXAS MUNICIPAL LEAGUE TEXAS CITY ATTORNEYS ASSOCIATION TEXAS ASSOCIATION OF COUNTIES TEXAS CONFERENCE OF URBAN COUNTIES

IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICI CURIAE

The Texas Municipal League (TML) is a non-profit association of over 1,150 incorporated cities. TML provides legislative, legal, and educational services to its members. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of over 400 attorneys who represent Texas cities and city officials in the performance of their duties. TML and TCAA advocate for the interests common to all Texas cities.

The Texas Association of Counties (TAC) is a non-profit corporation with all 254 Texas counties as members. The following associations are represented on the Board of Directors of TAC: the County Judges and Commissioners Association of Texas; the North and East Texas Judges' and Commissioners' Association; the South Texas Judges' and Commissioners' Association; the West Texas Judges' and Commissioners' Association; the Texas District and County Attorneys' Association; the Sheriff's Association of Texas; the County and District Clerks' Association of Texas; the Texas Association of Tax Assessor-Collectors; the Texas County Treasurers' Association; the Justice of the Peace and Constables' Association of Texas; and the County Auditors' Association of Texas. TAC advocates for the interests common to all Texas counties.

The Texas Conference of Urban Counties (CUC) is a nonprofit organization composed of 37 member counties, representing approximately 80% of the

population of Texas. CUC members collaborate to realize efficiencies for Texas residents. CUC provides legal, legislative, and educational services for its member counties.

Believing that the issue before this Court is of significance to all Texas cities and counties, TML, TCAA, TAC, and CUC respectfully submit this brief and urge the Court to grant the petition for discretionary review.

The author of this brief is a salaried employee of TML who has received no fee, other than ordinary salary paid by the TML, for the preparation of this brief.

SUMMARY OF ARGUMENTS

Clarity regarding when (if ever) members of a governing body may communicate with one another outside of posted public meetings is vital to the business of governing. To that end, and rather than weighing-in on the substantive issue of whether Government Code Section 551.143 violates the First Amendment, *Amici's* purpose here is to inform the Court how city and county officials desperately need guidance as to what they can and cannot do. The proper functioning of city and county government may depend on it.

ARGUMENTS[1]

Texas has 254 counties and approximately 1,200 incorporated cities. Over 7,000 people serve as mayors and councilmembers in Texas, and about 1,270 serve as county judges and commissioners. Texas cities range in size from Houston, with approximately 2.1 million residents, to over 400 cities with a population of less than 1,000. Texas counties range in size from Harris, with over 4.5 million residents, to almost 150 with a population of less than 25,000. Some cities and counties employ a large number of professional staff, while others have no full-time employees. Large cities generally have in-house legal counsel, while small and medium-size cities usually appoint outside legal counsel—with varying

[1] *Amici* adopt, and incorporate by reference, the statement of the case and procedural history in Appellee Doyal's Petition for Discretionary Review.

degrees of expertise in municipal law—to serve as city attorney. Despite the many differences among the local governments in Texas, all of these local officials must comply with the Texas Open Meetings Act (TOMA). To the extent any of TOMA's requirements cause confusion, clarification is always welcome. To the extent the criminal penalty provisions of TOMA cause confusion, clarification is essential.

The provision at issue here, Government Code Section 551.143(a), makes a TOMA violation a criminal offense; it provides as follows:

> (a) A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

TEX. GOV'T CODE ANN. § 551.143(a). At its essence, this provision establishes the boundaries of any and all conversations about local government business among members of a governing body outside of posted meetings. Thus, the issues presented here—the constitutionality and meaning of Section 551.143—are of enormous practical consequence. They are of consequence not only to thousands of local officials, but also to the entities they serve.

Amici fully support the policies underlying open government laws and, in particular, the TOMA. *Amici's* members implicitly understand the importance of open government. Moreover, our members understand that open government laws, as any other law, need to be enforced in order to have any realistic impact.

However, without clarification, Section 551.143 leaves open the possibility that local officials will become unwitting lawbreakers. Appellee Doyal's brief explains why this case is so important to local public officials, but *Amici* seek to explain the import of this case to the entities they serve. In other words, we write to explain to the Court why cities and counties in Texas need answers to the questions presented here.

With that goal in mind, *Amici* draw the Court's attention to the fact that, without clarity, local officials may forego communicating with one another *at all*. A lack of communication among members of a governing body may lead to a decline in collegiality, which is particularly problematic in the highly-divisive times in which we live. *See* Cheryl Cooper, *"Beyond Debatable Limits": A Case for Legislative Clarification of Florida's Sunshine Law*, 41 Stetson L. Rev. 305, 340 (2012) (describing research that shows how sunshine laws may impede the government decision-making process by hampering collegiality). In addition, newly-elected officials often rely on more experienced officials to educate them about background facts, policy, and laws regarding pending issues. They may also seek guidance about local parliamentary procedures used to conduct meetings. Oftentimes, officials are reluctant to ask questions about these matters at open meetings for fear they will expose their inexperience. *See* Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 Drake L. Rev.

11, 21-25 (2004) (discussing impediments to open discussions and deliberations).

Local officials need to have frank discussions. Those frank discussions are essential to high-quality decision making by a body. And high-quality decision making is essential to well-functioning cities and counties. For the benefit of the citizens they serve, local officials need clarification regarding when (if ever) they may communicate with one another. Without clarity regarding the meaning and constitutionality of Section 551.143:

1. City and county officials may avoid inter-agency discussions. It is not difficult to imagine a scenario in which two county officials and a city official (rather than a political consultant) might want to meet with some third party, and then take the matter back to their individual governing bodies for action. Inter-agency discussions can result in myriad benefits, including improved health and safety for residents, cost savings, and administrative efficiencies. Just like for individual governing bodies, frank and collegial inter-agency collaboration is important. City and county officials need to know when (if ever) they can communicate with one another outside of posted meetings.
2. Power may be transferred from elected officials to staff. If local officials forego communicating with another, they will relinquish decision-making and responsibility for communication to city and county staff. *See* Cheryl

Cooper, *"Beyond Debatable Limits": A Case for Legislative Clarification of Florida's Sunshine Law*, 41 Stetson L. Rev. 305, 340 (2012); Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 Drake L. Rev. 11, 26-27 (2004); Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 Tenn. L. Rev. 309, 360-67 (2011) (discussing how open meeting laws can hamper compromise, generate evasive behavior, and shift power to staff and lobbyists). People who control information have power. Local governments, those closest to the people, need governing bodies that feel confident to fully engage in the governing process.

3. Individuals will likely be discouraged from serving, or continuing to serve, as local legislators in their communities. Many local officials are part-time volunteers with full-time day jobs. Faced with unanswered questions about Section 551.143, well-qualified persons will likely be hesitant to participate. While larger cities and counties may have few problems attracting candidates, small local governments often struggle to find them. And when it comes to the TOMA, compliance concerns by small local governments are often magnified because members of the governing body are likely to run into fellow members in the grocery store, at church, or wherever they go

around town. Cities and counties are not well-served by shallow pools of candidates to serve on their governing bodies.

4. Attorneys serving cities and counties are likely to advise their clients in the most conservative manner and, as a result, discourage communication. *See* Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 Drake L. Rev. 11, 26-27 (2004). Florida's Sunshine Law, generally considered one of the strongest in the nation, is applicable to any gathering where two (or more) members of a public board or commission discuss some matter on which foreseeable action will be taken by that board or commission. *Board of Pub. Instruction v. Doran*, 224 So.2d 693, 698 (Fla. 1969). Thus, it's clear that one-on-one discussions among members of the governing body are prohibited in Florida. Whether right or wrong, that clear line of prohibition is not found in the TOMA. Instead, those boundaries are established, in part, by Section 551.143. Without clarification about the constitutionality and meaning of Section 551.143, local government lawyers are likely to advise officials to take the safest course of action—avoid all discussions outside of posted meetings. *See* David Escamilla & Scott Houston, *Open Government Compliance and Enforcement The Texas Open Meetings Act: "What Can We Say?!"* 6 (July 2015), https://www.tml.org/p/20_Escamilla_Houston.pdf. In other words, without

clarification from this Court, local government attorneys are incentivized to advise their clients in a way that discourages communication among members of the governing body.

The concerns shown above illustrate why cities and counties, and by definition their citizens, have a vested interest in properly functioning governing bodies. Because of those concerns, *Amici* suggest that guidance from this Court is necessary.

PRAYER

For the reasons described above, TML, TCAA, TAC, and CUC respectfully request that the Court grant the petition for discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 2,376 words. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I have relied on the word count provided by the software used to prepare the document.

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